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U.S. Citizenship
and Immigration
Services

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FILE:

XHU-88-184-6071

Office: NEWARK

Date:

OCT 08 2008

IN RE:

Applicant:

APPLICATION:

Application for Temporary Resident Status under Section 245A of the
Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed, you no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The termination of the applicant's temporary resident status by the Director, Newark District Office, is before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the record remanded for further action consistent with this decision.

The applicant submitted a Form I-687, Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act (Act), 8 U.S.C. § 1255a(a), on May 4, 1988. The application was approved on May 1, 1989. On April 14, 2006, the applicant submitted Form I-698, Application to Adjust Status from Temporary to Permanent Resident. The director issued a Notice of Intent to Deny Application to Adjust Status from Temporary to Permanent Resident and to Terminate Temporary Resident Status on February 28, 2008, based on the applicant's failure to file Form I-698 within 43 months of the date he was granted status as a temporary resident, as required under section 245A(b)(1)(A) of the Act, 8 U.S.C. § 1255a(b)(1)(A). In the final denial and termination notice, issued on April 2, 2008, the director noted that the applicant never submitted a response to the intent to deny his application and terminate his temporary status; and failed to timely file his Form I-698 application or demonstrate any exceptional circumstances for his failure to do so.

On appeal, the applicant, through counsel, states that he responded to the February 28, 2008 Notice and requested a discretionary waiver on March 27, 2008. He indicates that a copy of that response is attached to the appeal, that the applicant had a legitimate reason for not filing the application on time, and that "[a]dditional proof has been submitted that would show that the applicant is a fine outstanding member of the community." The record does not contain any correspondence dated March 27, 2008, but does contain two letters of appreciation from the applicant's prior employers and a recommendation from the African Islamic Community Center.

Based on the law governing the adjustment of temporary residents to lawful permanent residents, cited above, it is clear that the applicant's Form I-698 filed in 2006 was not timely. On appeal, the applicant has not provided any reason for this delayed filing. However, the record contains evidence from the U.S. Immigration and Naturalization Service (or Service, now U.S. Citizenship and Immigration Services or CIS) that the applicant filed a prior Form I-698 in 1992 in a timely manner. On appeal the AAO will consider this evidence of timely filing in a *de novo* review of this case.¹

Section 245A(b) of the Act provides for the adjustment to permanent residence of individuals who were granted lawful temporary resident status under section 245A(a) of the Act. Section 245A(b)(1)(A), "Timely Application After One Year's Residence," was amended in 1990.² It now

¹ The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See*, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

² The one-year extension of the deadline for filing such applications for adjustment to permanent residence was made by Sec. 703(a)(1) of the Immigration Act of 1990, Act of Nov. 29, 1990, Pub. L. No. 101-649, 104 Stat. 4978.



provides, "the alien must apply for such adjustment during the 2-year period beginning with the nineteenth month that begins after the date the alien was granted such temporary resident status."

The record reflects that the applicant was granted temporary resident status under section 245A of the Act on May 1, 1989. The deadline for filing his application to adjust to permanent resident status would have been 43 months later (two years plus 19 months), or December 1, 1992.

The following relevant evidence is included in the record:³

- A notice from the Service to the applicant, dated November 2, 1992, that the Immigration Act of 1990 provides an additional 12 months to file for permanent residence and requires a fee of \$120. The notice states that the applicant was sent a package containing the application forms needed to apply.
- The applicant's letter to the Service, dated November 16, 1992 and received by the Service November 19, 1992, informing the Service that "said package" never arrived and requesting another.
- A letter from the Service to the applicant, dated December 4, 1992, stating that the applicant's Form I-698 application for permanent residence was received but cannot be processed for lack of the late filing fee of \$40. This letter indicates that the permanent residence filing deadline was extended to 43 months, and a handwritten note at end of the letter adds, "you can get the I698 forms from your nearest [Service] office or call for forms."

The evidence noted above shows that the applicant filed Form I-698 between November 16 and December 4, 1992, but did not include the \$40 late filing fee. The evidence also shows that the notice and letter from the Service were either misleading or non-responsive. The Service first advised the applicant that he had an additional 12 months to file his application, an ambiguous notice that did not clarify when the 12 months were to begin; and the Service advised the applicant to obtain an application form and file it at a time after his filing deadline had passed. In light of such errors and evidence that the applicant's Form I-698 was received by the Service before December 4, 1992, the AAO considers that the applicant timely filed his application for adjustment to permanent resident status within the 43-month deadline, by December 1, 1992. The AAO will also waive the required \$40 late filing fee.

The filing date on the 2006 Form I-698 will be amended to reflect that it is a substitute for the Form I-698 that was timely filed on December 1, 1992. As the applicant's Form I-698 was timely filed, the denial of adjustment to permanent residence and termination of the applicant's temporary resident status for failure to timely file is in error. The appeal is therefore sustained on that basis.

³ The AAO also notes that the record indicates that the applicant was issued an order of deportation on September 6, 1979 and ordered to depart on October 4, 1979.

The Notice of Termination is withdrawn. The record will be remanded to the director to consider the applicant's timely filed Form I-698 application. If the decision is adverse to the applicant, it shall be certified to the AAO.

ORDER: The appeal is sustained. The record is remanded for action consistent with this decision.